United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

443

BRIEF FOR APPELLANT
AND
JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 20,168

F 482 A

JAMES F. SWAILES,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal from the District of Columbia Court of Appeals
for the District of Columbia

THOMAS M. O'MALLEY
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STATEMENT OF QUESTIONS PRESENTED

In the opinion of the Appellant the following questions are presented:

1. Whether it is speculation to assume that a trial judge sentencing a man with a relatively good record, on a minor traffic offense to "sixty days in jail" has been influenced by a "highly improper" probation report?

2. Whether it is permissible for a judge to make a finding of guilty on two charges of an information after a jury has made a determination of not guilty on another two counts of the information at the same presentment and when all four counts are predicated on the same evidence?

3. Whether it is harmless error for a court to deny the issuance of a subpoena for impeachment evidence when a timely request for same has been made?

4. Whether it is permissible for a court to make a determination of guilty predicated upon conflicting evidence by two police officers on material matters where both officers had the same opportunity for observation?

5. Whether it is legal for a court to sentence a man to serve time, with no suggestion of a fine in the alternative when the statute provides only for a fine, or in the alternative, a jail sentence, and does not provide the words "or both."

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TABLE OF CASES

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lanes without caution (Section 32, Traffic and Motor Vehicle Regulations for the District of Columbia). The judgment of the trial court was entered on June 14, 1965, and appellant was permitted to remain on bond pending the appeal. Appellant was sentenced to serve a term of imprisonment for sixty days on the "excessive speed" information and Ten Dollars or two days on the "changing lanes" information.

This Court has jurisdiction under the provisions of Rule 1, Rules of the United States Court of Appeals for the District of Columbia Circuit Governing Review of Cases from the District of Columbia Court of Appeals.

STATEMENT OF CASE

Appellant was tried in the District of Columbia Court of General Sessions on four charges: 1) Tr. 6100-65 "Driving While Drunk" (JA 18); 2) Tr. 6101-65, "Reckless Driving"; 3) Tr. 6102-65 "Changing Lanes" (JA 12) and 4) Tr. 6103-65, "Excessive Speed" (JA 15).

Appellant was tried by a jury on the "Driving While Drunk" and "Reckless Driving" charges and found "not guilty". The Court subsequently entered a finding of "guilty" on the "changing lanes" and exceeding the speed limit charges (JA 14 and 17, respectively).

The violations charged against the appellant are all alleged to have occurred at about 6:45 p.m. on March 6, 1965, a Saturday, in the vicinity of the 3100 block of Sherman Avenue, N. W. in the District of Columbia (JA 1 and 2).

The evidence in the Appellee's case in chief consisted of the testimony of two members of the Metropolitan Police Department, William Cipher and Donald Hult, and it contained important and material inconsistencies.

The charges of "Driving While Drunk" and "Reckless Driving" were predicated on evidence tending to show that Appellant "changed lanes without caution" and drove at a rate of speed in excess of forty miles per hour.

Officer Cipher testified (J.A. 1 thru 6) substantially as follows: In the 3100 block of Sherman Avenue he saw a car going north at a high rate of speed, chased him approximately three blocks and stopped him at Sherman and Park Road, N. W. When they got him stopped, he had to stop for a red light, there was traffic in front of him. The highest speed that they were going was approximately 45 miles per hour; his (appellant's) speed was 40 miles per hour.

On cross examination, Officer Cipher testified that there was just one car between the police car and the appellant's car. At the beginning of the chase there were eight car lengths separating them from the appellant and they (police) came within a car and one half of the appellant's car in ten or fifteen seconds. When they were a car and one half behind him they were clocking him at 40 miles an hour at that time; for two or two and one half blocks. This officer was on the passenger side of the front seat of the police car.

He further testified that bloodshot eyes had no effect upon his determination that the appellant was under the influence of alcohol and he had never made such a statement to appellant's counsel.

Officer Hult testified they first observed the appellant in the 2800 or 2900 block of Sherman Avenue, that traffic was medium and approximately 4, 5 or 6 cars intervened between them. He (Officer Hult) went at an intermittent speed, it was up and down, it went up to 50 miles an hour and he really did not get a good speed check on him. He didn't pace at any steady interval of speed.

It was approximately two or three blocks before they got right next to appellant's car and during that time they were accelerating to catch up to appellant's car. In his report he said appellant was driving at 40 miles per hour (J.A. 6 thru 9).

Appellant requested the Court to issue a subpoena *duces tecum* directed to the Director of Motor Vehicles to appear with certain records for the purpose of impeaching the testimony of Officer Cipher (J.A. 10) and this request was denied.

A ruling on appellant's motion for judgment of acquittal at the conclusion of appellee's case was reserved and at the conclusion of all of the evidence was denied.

A report from the Probation Office was obtained which stated *inter alia*, "As a result of interview of the defendant and review of the entire situation, this man having been under the influence of liquor when this offense took place (however, he was found not guilty of Driving While Drunk), it would appear that this man has forfeited all right to further consideration with respect to probation in this case."

The Court then proceeded to sentence the appellant to sixty days in jail for exceeding the speed limit and ten dollars or two days for changing lanes without caution.

STATUTES INVOLVED

40 D.C.C. 605(a)

> "No vehicle shall be operated at a greater speed than permitted by the regulations adopted under the authority of this chapter."

40 D.C.C. 605(d)

> "Any individual violating any provision of this section, except where the offense constitutes reckless driving, shall upon conviction thereof be fined not more than $300 or be imprisoned not more than ninety days."

Traffic and Motor Vehicle Regulations for the District of Columbia.

Section 22(b)

"Where no special hazard exists that requires lower speed for compliance with (a) of this section, the speed of any vehicle not in excess of the limits specified in this section or established as hereinafter authorized shall be lawful, but any speed in excess of the limits specified in this section or established as hereinafter authorized shall be *prima facie* evidence that the speed is not prudent or reasonable and that it is unlawful:

1. Twenty-five miles per hour unless otherwise designated by official signs, ...

Section 22(d)

"Any individual violating any provision of this section, except where the offense constitutes reckless driving, shall, upon conviction thereof, be fined not more than $300 or be imprisoned not more than 90 days."

Section 32

Whenever any roadway has been divided into two or more clearly marked lanes for traffic, the following rules in addition to all others consistent herewith shall apply:

(a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

Section 158

Any person violating any of the provisions of any section or paragraph of these regulations wherein a penalty is not specifically provided shall, on conviction, be punished by a fine of not more than $300 or imprisoned not more than 10 days, or both.

SUMMARY OF ARGUMENT

I

A sentence motivated by bias and prejudice on the part of the trial judge is an unlawful sentence and must be set aside.

II

"Unreasonable Speed" and "Changing Lanes Without Caution" are lesser included offences of "Reckless Driving" and a verdict of "Not Guilty" on the latter is a bar to subsequent finding of "Guilty" on the lesser included offenses.

III

When a timely request is made to the Court for the issuance of a subpoena for the production of material testimony for the impeachment of a hostile witness it is error for the Court to determine the evidence cumulative and the Petition addressed to the discretion of the Court.

IV

Inconsistent testimony on material points of evidence by two police officers with the same opportunity for observation does not satisfy the requirement of proof beyond a reasonable doubt.

V

Where a statute merely provides for a sentence of three hundred dollars or ninety days in jail it is illegal for a Court to impose a straight-time sentence.

ARGUMENT

I

A SENTENCE MOTIVATED BY BIAS AND PREJUDICE ON THE PART OF THE TRIAL JUDGE IS AN UNLAWFUL SENTENCE AND MUST BE SET ASIDE.

The trial judge in conjunction with the probation office palpably manifested their prejudice against this defendant and his crime and precluded that condition of the mind essential for the imposition of a fair and objective sentence.

The appellant had been acquitted of the charges of "drunken driving" and "reckless driving", serious offenses, the conviction of which would have warranted or permitted a substantial sentence.

This particular judge's antipathy for persons involved in crimes associated with the use of intoxicating spirits is so notorious as to require little demonstration. This mental attitude, coupled with the sentence of sixty days for exceeding a twenty-five mile an hour speed limit by a party to "a most successful marriage", the father of "three children ranging in age from 11-17 years", a home owner, gainfully employed and a history of gainful employment and as the probation officer said: "although the use of alcohol was involved in this offense, it is the opinion of this officer that this was a rather isolated experience and there are no strong indications that alcohol is a problem in this man's life" is sufficient showing of prejudice to warrant this Court in setting aside the sentence as one motivated by prejudice.

If further evidence is needed as testimony to the bias and prejudice of this Judge we need only to look to the Probation Report (JA 20) providentially provided. "As a result of interview of the defendant and review of the entire situation, this man having been under the influence of liquor when this offense took place (however, he was found "not guilty" of "Driving While Drunk"), it would appear that this man has forfeited all right to

further consideration with respect to probation in this case." So said the probation officer in his report to the Court, and assuming the time and money spent in maintaining the Probation Office, one must infer that the reports emanating from there are considered and followed by the sentencing judge.

The Probation Officer in this case has substituted his finding of guilty on the "driving while drunk" charge for the "not guilty" verdict of the jury. His recommendations with regard to sentencing are clearly for the crime of "driving while drunk" and not for "exceeding the speed limit". There can be little doubt that the Court was moved by the report's searing admonition "this man has forfeited all right to further consideration with respect to probation in this case", and "he must realize the hard way that his rights stop precisely where others begin". All of this might be true on the "driving while drunk" charge but it is hardly applicable to the charge of "exceeding a twenty-five mile an hour speed limit."

II

"UNREASONABLE SPEED" AND "CHANGING LANES WITHOUT CAUTION" ARE LESSER INCLUDED OFFENSES OF "RECKLESS DRIVING" AND A VERDICT OF "NOT GUILTY" ON THE LATTER IS A BAR TO SUBSEQUENT FINDING OF "GUILTY" ON THE LESSER INCLUDED OFFENSES

The only evidence introduced by the appellee to support the charge of "reckless driving" was that the appellant traveled at an "unreasonable speed" and that he "changed lanes without caution". These offenses were therefore, lesser included offenses of the charge of "reckless driving". It would follow that the jury's verdict of "not guilty" of "reckless driving" is a bar to a subsequent finding on the lesser included offenses of "unreasonable speed" and "changing lanes without caution".

As Judge Holtzoff said:

> "The Fifth Amendment to the Constitution of the United States provides: * * * 'nor shall any person be subject to be twice put in jeopardy of life or limb' . . . This provision of the Constitution is a valuable guarantee of personal rights, and constitutes the basis for a plea of former jeopardy. The Constitutional safeguard applies in four principal situations: in case a person has been tried and convicted of a crime and it is sought to presecute him again for the same or an included offense . . ." *United States* v. *Whitlow*, 110 F. Supp. 871 (Decided March 6, 1953).

The charges were necessarily "lesser included offenses", for without them there would have been absolutely no evidence upon which to predicate a charge of "reckless driving" and the authorities appear to be in agreement in maintaining that acquittal of the greater charge is a bar to prosecution on the lesser charge.

> "We achieve something of a pattern however when we consider that almost all states now agree that a defendant may not again be subjected to jeopardy if he has been previously acquitted or convicted of the same crime, or any degree, higher or lower of the same crime, or of the greater or lesser of a necessarily included crime." *People* v. *DeSisto*, 214 N.Y.S.2d 858.

The District of Columbia Court of Appeals on an analogous subject has made as clear and lucid a pronouncement in this area of the law as can be found in the authorities:

> "Appellant was acquitted of a charge of committing an indecent act on July 7th, and the Government is thereby precluded, as a matter of law, from relying upon the evidence relating to this alleged in indecent act to support its charge of an alleged indecent exposure on the same night. By acquittal of the former charge, the issue of 'an indecent act' is *res judicata* and cannot be considered as evidence to support the second charge of indecent exposure." *Hearn* v. *District of Columbia*, 178 A.2d 434 (Decided March 5, 1962).

Whether the theory of the Court is *res judicata* or collateral estoppel the conclusion remains the same.

III

WHEN A TIMELY REQUEST IS MADE TO THE COURT FOR THE ISSUANCE OF A SUBPOENA FOR THE PRODUCTION OF MATERIAL TESTIMONY FOR THE IMPEACHMENT OF A HOSTILE WITNESS IT IS ERROR FOR THE COURT TO DETERMINE THE EVIDENCE CUMULATIVE AND THE PETITION ADDRESSED TO THE DISCRETION OF THE COURT

The testimony of Officer Cipher was critical in this case and he testified that he had never made the statement to counsel for the appellant that appellant had a bloodshot eye and that was one of the things he considered in concluding that appellant was "driving while drunk" (JA 5).

A request was made for issuance of a subpoena directing the appearance of an employee of the District of Columbia Government before whom an inconsistent statement in this particular was given (R-42). The Court rejected the petition stating: "I think it is, at best, cumulative and I think that it's arguable, but I am inclined to the opinion that it is a matter of discretion at this point. And I would think, under all the circumstances that the defendant doesn't really need this testimony. There is enough in this record to give this man a fair trial, and I think we've done that so far."

Independent impeachment testimony can hardly be construed as "cumulative" unless the Court has first determined that the officer's testimony had in fact been impeached by other testimony, and this his ultimate finding appears to contradict. The presentation of material, relevant testimony by a defendant can hardly be construed as "a matter of sound discretion" by the Court. And rules of evidence and not the opinion of the trial judge determines whether or not a defendant is having a fair trial.

Civil Rule 45 of the District of Columbia Court of General Sessions Rules provides for the issuance of subpoena by the Clerk of the Court as does Rule 45(a) F. R. Crim. Procedure. There appears to be

no rule requiring signature by the Court though this is the practice in the lower court and the appropriate forms provide a place for the Court's signature.

The Clerk in the instant case refused to issue the subpoena as did the Chief Judge and suggested to counsel that petition be made to the trial judge. This procedure was followed and the Court refused to issue the subpoena. Such conduct was not warranted by the rules of procedure and was error.

IV

INCONSISTENT TESTIMONY ON MATERIAL POINTS OF EVIDENCE BY TWO POLICE OFFICERS WITH THE SAME OPPORTUNITY FOR OBSERVATION DOES NOT SATISFY THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

The Court erred in denying appellant's motion for judgment of acquittal at the conclusion of all of the evidence.

The only testimony proferred against the appellant was that of the two officers in the pursuing squad car, one the driver and the other sitting in the passenger position in the front seat of said squad car.

Officer Hult, the driver, and Officer Cipher, the passenger, contradicted each other on the following material testimony:

1. Cipher: "At approximately in the 3100 block of Sherman Avenue, while responding on an accident call, I observed a Chrysler going north on Sherman towards Park Road at a high rate of speed" (JA 2).

   Hult: "Q. And where were you when you first observed Mr. Swailes car? A. On Sherman Avenue, oh, about — (pause) — twenty eight, twenty nine-hundred block, I believe" (JA 6).

2. Cipher: "We chased him approximately three blocks and we got him stopped at Sherman and Park Road, Northwest, . . . (JA 2).

   Hult: "We stopped the automobile at Sherman and Monroe approximately" (JA 6).

3. Cipher: "The highest speed we were doing was approximately 45 miles an hour" (JA 3).

   Hult: "I went up to 50 miles an hour" (JA 8).

4. Cipher: Q. –were there any cars intervening between you and Mr. Swailes? A. Just one (JA 3).

   Hult: Q. Could you approximate for the jury how many (cars) there were? A. Four or five, six (JA 8).

5. Cipher: Q. You never did clock him to see how fast he was going; did you? A. Yes, sir. When we were approximately a car – I would say, approximately a car and a half behind him we were clocking him at 40 miles an hour at that time.

   Q. For how many blocks? A. That would be approximately – I would say approximately two blocks, two and a half blocks (JA 5).

   Hult: Q. And how long was it before you got right next to Mr. Swailes' car? A. Approximately two or three blocks.

   Q. Now during those two or three blocks were you accelerating to catch up to Mr. Swailes' car? A. Yes . . .

   Q. So, you really didn't have too good a speed check on him. A. No; I really didn't get too good a speed check on him (JA 8).

6. Cipher: "His speed was 40 miles an hour" (R-7).

   Hult: Q. So you don't know what his speed was. A. I said approximately 40 miles in my report (JA 3).

The substance of their testimony is that they began pursuing the appellant in either the "3100 block" or the "twenty-eight or twenty-nine hundred block"; there was either "one car" or "four, five or six cars" intervening between the appellant's car and the squad car at the beginning of the chase; the squad car reached speeds of "45 miles an hour" or "50 miles an hour"; "yes sir," they clocked him or "no, I didn't get too good a speed check on him"; they were either right next to appellant's

car for two or three blocks or it was two or three blocks before they got next to appellant's car and finally, they stopped appellant's car at either "Sherman and Monroe" or "Sherman and Park Road".

No trier of the facts could have determined beyond a reasonable doubt on the testimony of Officer Hult that the appellant had exceeded the speed limit for he admits he did not get a speed check and when asked to estimate the speed he relies upon what was contained in his report.

Officer Cipher's testimony, when standing alone, affords a predicate for a finding that appellant exceeded the speed limit, for he had a good speed check for two or three blocks and he estimated the speed of appellant to be 40 miles an hour. But his testimony taken in conjunction with the actual driver of the squad car and the testimony given necessitates doubt as to which of the two witnesses is giving true testimony; and assuming both to have been soncientious in trying to recall the events, which of the two had a better opportunity to observe and remember? We suggest that the driver of the squad car was more personally involved and had a much better vantage point from which to observe.

In the case of *Seidenberg* v. *District of Columbia*, 71 A.2d 607, this Court said: "The arresting officer testified that he had paced defendant for about two blocks at a speed varying from thirty-three to thirty-eight miles per hour . . . Under the circumstances we cannot say that the trial judge was wrong in making a finding of guilty." The instant case is distinguishable on the facts from that case and without such compelling evidence as occurred there, the Court must entertain a reasonable doubt.

V

WHERE A STATUTE MERELY PROVIDES FOR A SENTENCE OF THREE HUNDRED DOLLARS OR NINETY DAYS IN JAIL IT IS ILLEGAL FOR A COURT TO IMPOSE A STRAIGHT TIME SENTENCE

40 D.C.C. 605(d) provides "that upon conviction thereof be fined not more than $300 or imprisoned not more than ninety days". The Court in this case sentenced the defendant to sixty days in jail but made no mention of a fine in the alternative.

It is interesting to compare other statutes involving traffic regulations. For a comparison:

> **"Drunken Driving":** "Any individual violating any provision of this subdivision shall, upon conviction for the first offense, be fined not more than $500 or imprisoned not more than 6 months, or both."

> **"Reckless Driving":** "Any individual violating any provision of this section where the offense constitutes reckless driving shall, upon conviction for the first offense, be fined not more than $250 or imprisoned not more than three months, or both."

> **"Negligent Homicide":** ..."and shall be punished by imprisonment for not more than one year or by a fine of not more than $1,000, or both."

The maximum penalty for reckless driving would be three months plus fine of $250. Whereas maximum penalty for going twenty-six miles per hour in a 25 m.p.h. zone would be merely ninety days. I am sure it was not the intention of Congress, really little concerned with money, to have so little concern for the disparity in gravity between the two crimes, remembering that "reckless driving" warrants a jury trial and "exceeding the speed limit" does not.

The more logical interpretation is that the 90 days being placed in the alternative to the fine rather than vice-versa and the absence of the language "or both" indicates that the 90 days was not intended as the primary sentence but only as compulsion for the payment of the fine.

Seidenberg v. *District of Columbia*, 71 A.2d 607 held: "As to the fine imposed, 'it may be' as counsel for the District say in their brief, that it was 'greater than that usually imposed under similar circumstances by this trial judge, or by other trail judges'. But it is also true that in the discretion of the judge a fine three times as great might have been imposed. Be that as it may, the fine was within the statutory limitations and we have no right to disturb it, *Gaston* v. *United States*, D. C. Mun. App., 34 A.2d 353.

The Court did not even discuss the possibility of a straight sentence of time though they appeared to be speaking of the limitations of the judge's discretion.

To the same effect is the legislative history of the enactment of 40 D.C.C. 605(d).

While S 2122 was pending before the Congress there was much correspondence between the District Committees and the District of Columbia Government, none of which concerned itself with the 90 days aspect of the legislation.

In speaking of the purpose of the legislation the president of the Board of Commissioners of the District of Columbia wrote to Senator McCarran, with regard to the purpose of the legislation. "When the case comes up for trial a plea of guilty is entered and the Court rarely imposes a penalty in excess of a $20 fine. The proposed amendment will remove the right of a defendant to the jury trial and will, in part, reduce the number of jury cases."

Judge Keech, then corporation counsel, by letter dated October 1, 1942 to Mr. Eberharter of Pennsylvania, a member of the District Committee, said: "The purpose of the first section is to permit the forfeiture of collateral for speeding violations in order to leave more time for the judges in Police Court to consider more serious offenses."...

"Under the suggested amendment greater discretion would be vested in the Court, and the penalty for the first or subsequent offenses could vary according to the facts in the particular case, from personal bond to $300. This, to my mind, is another potent reason for passage of S 2122."

The entire history of this legislation was to lessen the number of trials, liberalize the procedure so as to permit a greater number of forfeitures and no place in the legislative history do we find an intent on the part of either the District of Columbia or the Congress to put minor traffic violators in jail, rather than pay fines or forfeit fines.

Respectfully submitted,

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EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1 DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS
CRIMINAL DIVISION

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DISTRICT OF COLUMBIA

v.

JAMES F. SWAILES,

Defendant.

- - - - - - - - - - - - - - - - - - x

Action No. TR-6100-65
" No. TR-6101-65
" No. TR-6102-65
" No. TR-6103-65

Washington, D. C.,
Friday, May 7, 1965.

The above-entitled matter came on for trial before JUDGE MILTON S. KRONHEIM, JR., and a jury, duly selected and sworn, in Courtroom No. 18, Criminal Division Building, at approximately 1:50 o'clock p.m.

* * * * *

4 WILLIAM CYPHER

was called as a witness for and on behalf of the District of Columbia and, having been duly sworn, was examined and testified as follows:

5 DIRECT EXAMINATION

BY MR. MILLER:

Q. State your name, rank, and duty assignment, please. A. Private William Cypher, assigned to the Accident Investigation Unit, Metropolitan Police force, Washington, D. C.

Q. Officer Cypher, were you so assigned on March 6, 1965? A. I was.

Q. Directing your attention to 6:45 p.m., did anything unusual happen at that time? A. Yes, sir.

Q. Will you describe to the Court what happened, please?

MR. O'MALLEY: Your Honor, if the officer doesn't need his notes to refresh his recollection, I think he better not use them. If he does need them, he may so state.

BY MR. MILLER:

Q. Testify to the best of your recollection, Officer. A. Approximately in the 3100 block of Sherman Avenue, while responding on an accident call, I observed a Chrysler going north on Sherman towards Park Road at a high rate of speed. At first he was over in the center lane, the center lane next to the oncoming traffic. He crossed over a white island which was painted, onto the other side of the street, almost came in collision with the safety island; then he pulled back over, cut in front of another car. At that time we put on our red light and siren and started to proceed after the defendant.

We chased him approximately three blocks and we got him stopped at Sherman and Park Road, Northwest, and at this time, during the three blocks' chase after him, he just about missed three safety islands, just about came in collision, and also went on the other side of the street, and right before we got him stopped, he almost came in collision with a police car.

When we got him stopped, he had to stop for a red light; there was traffic in front of him. At that time I got out of my car and asked the defendant to get out of his, and when he opened the door and got out, he was staggering, needed support to stand up, and he started asking, "What's wrong? What did I do wrong?"

At that time I told him and asked him if he had been drinking. He said, "Yes."

I asked him, "What?" He said, "Beer." He said he had a couple beers at his sister's.

And at that time I advised the defendant what I was charging him with. We waited there for a wagon -- we called and they never did come; they were coming in from another precinct and --

7 MR. O'MALLEY: Your Honor, I don't see anything more material that he can testify to in that regard.

THE COURT: Very well.

BY MR. MILLER:

Q. Could you estimate his speed, Officer? A. The highest speed that we were doing was approximately 45 miles an hour.

MR. O'MALLEY: Objection.

BY MR. MILLER:

Q. Estimate his speed. A. His speed was 40 miles an hour.

Q. What is the speed limit? A. Twenty-five miles an hour.

* * * * *

8 CROSS-EXAMINATION

BY MR. O'MALLEY:

Q. Officer Cypher, I believe you said you chased Mr. Swailes for three blocks; is that correct? A. Yes, sir.

Q. And when you began this chase, how far away from you was Mr. Swailes' car? A. We were approximately eight carlengths behind him.

Q. And were all these carlengths -- were there any cars intervening between you and Mr. Swailes? A. Just one.

Q. What happened to that car? A. When we put on our red light and siren, that car stopped and we went around him and then after we passed him, I imagine he pulled out.

Q. And what? A. I would imagine he pulled out after we passed him. We had our red light and siren on at that time we were passing him.

9 Q. How long did it take you to close that distance, that eight carlengths between you and Mr. Swailes? A. Well, it wasn't closing carlengths, sir, because he was going fast and we had to go faster in order to catch up to him, and at that time we were able to get him stopped in three blocks.

Q. My question is: how long did it take you -- A. I cannot tell you, sir.

Q. -- in distance? A. Well, approximately -- (pause) -- I'd say we were able to get within a car and a half away from him, within approximately ten or fifteen seconds.

Q. How far in distance though? How far in a block? You used the distance of three blocks before. That gives us a good idea of -- A. Well, he just left one block and we got him at least a quarter -- at least one-half carlengths behind him within a quarter of the first block.

Q. Within a quarter of the first block. A. That's correct.

Q. All right. And then you proceeded to pace him, did you, for the next two and a half blocks? A. We tried to stop him. We had our red light and siren on at that time and he kept on going and would not stop for us.

* * * * *

10 Q. And what did you do to attempt to have him pull over, other than have your siren going? A. Whenever he went over into the oncoming traffic, we tried to get up alongside him. That was just about right before we had him stopped. And then he just came right over towards our scout car. At that time we had to slow down in order not to come in collision with him, and he pulled out in front of us, and we kept on -- my partner kept on blowing the siren. Finally, he came up behind three parked cars. Three cars were stopped for a traffic light at Park Road and he could not get around them. At that time we pulled up at the safety island at his side and I got out of the car.

Q. Did he slow down as he approached those cars? A. He slowed down all at one time.

Q. What do you mean by that? A. Well, I mean he wasn't braking when he was approaching. He more or less -- I would estimate he was

11 approximately a carlength, two carlengths behind when he started to brake.

* * * * *

Q. So, for this approximately two and a half blocks your car was accelerating to catch up with him. After you would catch up, you would

slow down and start up again; is that correct? A. No. We were -- I would say that we were caught up with him within the first block. He just wouldn't stop.

Q. But then later, I believe you told us, his car came toward you and you had to slow down. A. That's right. We braked it.

Q. Yes. And then you came to a stop, also, when he came to a stop at the end of this three blocks; is that correct? A. That's correct.

Q. You never did clock him to see how fast he was going; did you? A. Yes, sir. When we were approximately a car -- I would say, approximately a car and a half behind him we were clocking him at 40 miles an hour at that time.

Q. For how many blocks? A. That would be approximately -- I would say approximately two blocks, two and a half blocks.

Q. Well, two and a half blocks, that's when he slowed down, too; isn't it? He came to a stop. A. Well, at the end of that third block. It was when he stopped right at the intersection there.

* * * * *

FURTHER CROSS-EXAMINATION

BY MR. O'MALLEY:

Q. I believe, Officer, you at one time said that one of the things that led you to believe that Mr. Swailes was under the influence of alcohol was that he had red eyes; is that correct? A. Bloodshot eyes.

Q. Bloodshot eyes. That was one of the facts or one of the observations you made that indicated to you that he was under the influence of alcohol; is that correct? A. That's just a question that we have on the police form that's to be answered, and that was not at the scene of the accident. It was dark that night, and I had a better observation of him at the precinct in order to answer these questions. And he was unsteady on his feet when he got out of the police car; he needed support on his -- not the police car, but his car -- as soon as he got out of his car, he stumbled onto his car.

Q. I don't think you are answering the question. I'm asking you about the bloodshot eyes. A. I answered that.

Q. I'm asking you if the bloodshot eyes had any effect upon your
16 determination that Mr. Swailes was under the influence of alcohol. A. No, sir.

Q. None? You never said anything to me about the bloodshot eye?

MR. MILLER: Objection, Your Honor. I believe he has answered the question.

THE COURT: Suppose we ask the last question once more.

BY MR. O'MALLEY:

Q. Did you ever make any observation to me that Mr. Swailes had a bloodshot eye and that was one of the things you considered? A. No, sir. I do not believe I ever made that statement to you.

* * * * *

DONALD F. HULT

was called as a witness for and on behalf of the District of Columbia and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MILLER:

17 Q. State your name, rank, and duty assignment, Officer. A. Private Donald F. Hult, assigned to the Traffic Division, Metropolitan Police Department.

Q. Were you so assigned on March 6, 1965? A. Yes, sir.

Q. Directing your attention to the time of 6:45 p.m., did anything unusual happen at that time? A. Yes, sir.

Q. Will you tell the Court the circumstances, please? A. We were patrolling on Sherman Avenue, Northwest, along with Officer Cypher and myself. We observed a light colored automobile weaving in traffic. We stopped the automobile at Sherman and Monroe approximately. The defendant -- excuse me -- the person in the automobile was a Negro male that appeared to be under intoxication.

Q. Did you chase this automobile? A. Approximately two or three blocks.

Q. Would you describe his manner of driving?

MR. O'MALLEY: I object to that: did he chase the automobile. We can't do anything about it now, but I suggest that he not lead his witness.

THE COURT: Well, I'll sustain the objection, strike the question, and suggest that it be reframed without the abusive elements of terminology.

BY MR. MILLER:

Q. Did you follow the automobile? A. Yes.

18 Q. Will you describe to the jury the manner in which the vehicle was being driven? A. It was being operated from one lane to the next lane through traffic at a high rate of speed and it was accelerating, then it would slow down and speed up, and slow down and speed up.

Q. Could you estimate his speed? A. Approximately 40 miles an hour.

* * * * *

19 CROSS-EXAMINATION

BY MR. O'MALLEY:

Q. What was your name, Officer? A. Donald F. Hult.

Q. Were you driving or were you -- or was Cypher driving?

A. I was driving.

Q. And where were you when you first observed Mr. Swailes' car?

A. On Sherman Avenue, oh, about -- (pause) -- twenty-eight, twenty-nine-hundred block, I believe.

Q. And where was -- how far away from Mr. Swailes' car were you when you first saw him? A. Oh, a half a block.

Q. And were there any cars intervening between you and Mr. Swailes? A. There was traffic. It was medium. There was traffic.

Q. Medium. A. Yes.

Q. How many cars were there between you and Mr. Swailes, if any? A. I don't know. I couldn't answer that.

20 Q. Don't you remember when you drove to go after him how many cars you passed? A. I didn't count them. There were several, but I don't know how many.

Q. Could you approximate for the jury how many there were?
A. Four or five, six.

Q. And how fast were those cars going? Do you recall? A. Normal rate of speed for the area.

Q. What was that? A. Twenty-five miles an hour.

Q. O.K. And how long was it before you got right next to Mr. Swailes' car? A. Approximately two or three blocks.

Q. Now, during those two or three blocks were you accelerating to catch up to Mr. Swailes' car? A. Yes.

Q. How fast were you going? A. I went up to 50 miles an hour.

Q. Up to 50? A. Yes.

Q. When did you reach 50 miles an hour, if you recall? A. I don't recall exactly when. It was an intermittent speed. It was up and down.

21 Q. Did you go 50 miles an hour? A. No; it was an intermittent speed. It was up and down.

Q. Up and down. A. Yes, sir.

Q. So, you recally didn't have too good a speed check on him.
A. No; I really didn't get too good a speed check on him.

Q. So, you don't know what his speed was. A. I said approximately 40 miles in my report.

Q. Yes. But you didn't go for any -- you didn't go for even a block at that speed. A. I didn't pace at any steady interval of speed.

* * * * *

23 Q. Did you notice that Mr. Swailes had a bloodshot eye? A. Yes, sir.

Q. When did you first notice that? A. When I walked over to the car and talked to him.

Q. And did you ask him or say anything to him about that bloodshot eye? A. I didn't point out the eye. I asked him what he had been drinking, if anything.

Q. And the fact that he had a bloodshot eye, would that indicate to you that he was under the influence of alcohol? A. Not necessarily at that time; no.

24 Q. But you did see that bloodshot eye at that time? A. I noticed his eyes at that time.

Q. I mean the lighting was such that you could do that. A. Yes, sir.

* * * * *

MOTION FOR DIRECTED VERDICT

MR. O'MALLEY: Your Honor, on the excessive rate of speed, I don't think that the Government has made out a case of excessive speed under the evidence that they have produced. They really haven't clocked the man for any distance at all according to this police officer who was actually driving and would have been the one to observe the speed at which he was going.

Further, they have inconsistent testimony. One police officer said that only the squad car speeded up and slowed down. He said that Mr. Swailes' car was going at pretty much the same rate of speed. However,

25 the other police officer says that Mr. Swailes would slow down and speed up, slow down and speed up. But, at any rate, taking both of their testimony at its best, I don't think they made out a case of excessive rate of speed.

THE COURT: Overruled.

* * * * *

28 JAMES F. SWAILES

the defendant, was called as a witness on his own behalf and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. O'MALLEY:

* * * * *

31 Q. Were you driving in a reckless manner at all? A. No, sir.

Q. Were you changing lanes without caution at all? A. Well, I didn't change lanes without caution. I just -- it was two carlengths up from where, when I made that changeover. When the guy made the

left-hand turn, I was behind him in the inside lane. After, when he got ready to make the left-hand turn, I moved over in the middle lane and continued to move and didn't change lanes no more until after I heard the siren go. I tried to get over to the side, right-hand side, going up.

* * * * *

33 CROSS-EXAMINATION

BY MR. MILLER:

* * * * *

35 Q. You say when you were driving on Sherman Avenue, you feel you were driving in a careful manner. A. Yes; I would say so.

* * * * *

41 Washington, D. C.,
Monday, May 10, 1965.

* * * * *

42 MR. O'MALLEY: One thing I took up with Your Honor this morning, and I would like to make a record of this. I wanted to subpoena the records and tape recording which was taken by an agent of Mr. George England, the Director of Motor Vehicles for the District of Columbia. His hearing examiner at that time was Mr. Garrett and I was present with the client at that time, and I have a vivid recollection that Officer Cypher testified that he arrived at the conclusion that the man was drunk because he had bloodshot eyes, thick speech and was staggering. And you may recall I asked Officer Cypher that on the stand, if he had told me that, and he said, "No;" that he didn't tell me, but then he went on to say that it was too dark and he couldn't have seen if he had bloodshot eyes.

43 So, I think that's very important and very material with regards to the impeachment of Officer Cypher, who is essential, I think, for the well-being of the prosecutor's case.

THE COURT: What do you have to say about that, sir?

MR. MILLER: Nothing. As I understand it, you wouldn't sign the subpoena.

THE COURT: No; I didn't phrase it that way.

MR. O'MALLEY: He didn't say that.

THE COURT: I wanted to know why it is necessary. Now he has told me why it is necessary.

MR. MILLER: I don't believe that it is that material. That is just one of the ingredients that went into his determination that he was under the influence. But only one.

MR. O'MALLEY: Your Honor, maybe we can -- I'm just as interested in getting along with this trial; I'm not concerned about perfecting a record. But I think the prosecutor would agree that the police officer did record that he did have bloodshot eyes on the night of the event. He has that as a part of his record. So, I would ask him if he would stipulate that the police officer did testify to the hearing examiner that he had bloodshot eyes and that was one of the factors that entered into his determination that the man was under the influence.

44 MR. MILLER: Well, as you recall, Your Honor, the police officer did not testify from his PD-10. He testified from the best of his recollection. It could have been an oversight on his part on the stand. I don't believe it should go to impeach his testimony.

THE COURT: All right. Have I heard everybody fully on this point?

MR. O'MALLEY: Yes, sir.

THE COURT: Well, I think we must consider the mechanics of the situation. This case was tried on Friday afternoon. The witness was subject to cross-examination, and this was mentioned in cross-examination.

I think it is, at best, cumulative and I think that it's arguable, but I am inclined to the opinion that it is a matter of discretion at this point. And I would think, under all the circumstances, that the defendant doesn't really need this testimony. There is enough in this record to give this man a fair trial, and I think we've done that so far.

If you want to make a statement that the witness Cypher said such and such a thing at a previous time, I'll allow it.

MR. O'MALLEY: Thank you.

THE COURT: All right.

* * * * *

WARRANT

No. ....

DISTRICT OF COLUMBIA, ss:

To the Chief of Police of the District of Columbia, Greetings:

Whereas, it appears by oath of

....

at ....

committed the offense as charged on the reverse side hereof,

YOU ARE THEREFORE HEREBY COMMANDED to take the said

....

and bring him/her before the said COURT OF GENERAL SESSIONS forthwith to answer said charge.

Witness the Honorable JOHN LEWIS SMITH, JR., Chief Judge of the District of Columbia Court of General Sessions, and the seal of said Court this .... day of .... A.D. 1965

WALTER F. BRAMHALL
Clerk, Court of General Sessions

....
Deputy Clerk

LET THIS WARRANT ISSUE

....
Judge, Court of General Sessions

OFFICER MUST EXECUTE CEPI

CEPI:
- Amount Collateral Posted $..........
- Date Collateral Posted ....
- Precinct Collateral Posted ....
- Remarks ....

OFFICER'S NAME ....

BOND

TR 6102-'65

Col. .... No. ....

At No. ...... Precinct Date ....

INFORMATION
TRAFFIC
DISTRICT OF COLUMBIA

vs.

(12)

James F. Swailes

Age .... Color ....

Tag No. ....

Notified to appear in Court at ....

VIOLATION OF TRAFFIC REGULATIONS

SIGNAL SMOKE SPEEDOMETER
FENDERS
UNSAFE VEHICLE BUMPERS
FAIL TO STOP FOR FIRE DEPT.
DRIVING OVER SIDEWALK,
FIRE HOSE
TURN — WRONG — CHANGE LANE

WITNESSES T.D

W. L. Cypher Officer

MAR 8 - 1965

BOOK .... TAG 266328
TICKET .... AUTO ....

T.D Precinct

FILED
MAR 9 9 30 AM '65
WALTER F. BRAMHALL
CLERK OF
DISTRICT OF COLUMBIA
COURT OF GENERAL SESSIONS

APR 12 1965
Cont 4/21/65
Not Reached

APR 21 1965
Cont. 5/7/65
Not Reached

MAY 7 1965
Cert. to J. Kronheim

PLEA NOT GUILTY
a 5/10/65

5/10/65
JUDGMENT GUILTY
C 6/14/65
for rep + sent.

JUN 15 1965
10 - 2

Concurrent With
TR 6103 '65

June 22, 1965
Notice of Appeal Filed.

District of ... General Sessions

CRIMINAL DIVISION ... 13

... TERM, A. D. 1965

THE DISTRICT OF COLUMBIA, ss:

CHESTER H. GRAY, Esq., *Corporation Counsel, by* { CLARK F. KING / ROBERT H. CAMPBELL / ... }

Assistant Corporation Counsel, who for the District of Columbia prosecutes in this behalf in his proper person, comes here into Court, and causes the Court to be informed, and complains that

... Irvin F. Lewis ...

... BARON

late of the District of Columbia, aforesaid, on or about the 6 day of ... in the year A.D. nineteen hundred and sixty-five, in the District of Columbia, aforesaid, and on ... 13th N.E. ... Street, Avenue, north, south, west, east.

Being then and there the driver of a certain motor vehicle ~~———~~ and did drive the same within and across the sidewalk area over any unprotected fire hose on said street

did then and there operate permit the operation and use of a certain motor vehicle said vehicle being then and there in an unsafe mechanical condition.

did start and move said vehicle which was stopped, standing or parked when such movement could not be made with reasonable safety.

did turn the said vehicle from a direct course or move right or left upon the said highway when such movement could not be made with reasonable safety.

did turn the said vehicle without first having given an appropriate signal.

approaching a street intersection for the purpose of making a right or left turn did fail to give continuously a signal either by hand or an approved signal device for not less than 100 feet before making such turn.

did then and there stop and suddenly decrease the speed of said vehicle on said street without first giving an appropriate signal in a manner as provided by law to the driver of any vehicle approaching to the rear of said vehicle.

being then and there the owner and person in charge of a certain motor vehicle in said District did operate and cause to be operated said vehicle, said vehicle being then and there loaded so that the load did then and there exceed the weight as set forth in the Table in the Traffic Code.

did fail to have the same equipped with a horn in good working order and capable of emitting a sound audible under normal conditions from a distance of not less than 200 feet

with a device in good operating condition to register the rate of speed of the vehicle in motion bumpers on the front and rear thereof

interstate motor truck engaged in the transportation of freight through said District did fail to follow the route designated as interstate truck routes

did operate said vehicle with fenders showing sharp or ragged edges extending beyond the original margin or width of the fender lines

did permit said vehicle to emit from the engine power and exhaust mechanism excessive fumes and smoke

did then and there operate a certain motor vehicle and approaching a street intersection for the purpose of making a left turn did fail to pass to the right of the center of the street where it entered the intersection, and upon leaving did fail to pass to the right of the center of the highway then entered

a right turn did fail to make the said right turn from the lane as close as practicable to the right hand curb or the edge of the roadway and did fail to remain on the right side of the street then entered as near as practicable to the left hand edge of the roadway

did fail to comply with the directions of official signs or markings placed on said street designating those lanes to be used by traffic moving in a particular direction, regardless of the center of the roadway

did drive to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction when such left side was not clearly visible and free of oncoming traffic

did turn from a lane of traffic other than the proper lane of traffic from which said turn is permitted

Contrary to and in violation of Traffic Regulation in such case made and provided, and constituting a law of the District of Columbia.

CHESTER H. GRAY,
Corporation Counsel

Personally appeared ... W. L. ... this ... day of ..., A. D., 1965, and made oath before me that the facts set forth in the foregoing information are true, and those stated upon information received he believes to be true.

...

JUDGMENT

June 15, 1965

Judge Kronheim

Plea Not Guilty.

Judgment Guilty.

10 - 2 Concurrent with TR 6103-65

Appeal Bond set at $500.00

See TR 6102-65

15

WARRANT

No.................

TRICT OF COLUMBIA, ss:

he Chief of Police of the
ict of Columbia, Greetings:

Whereas, it appears by oath of

....

....

nitted the offense as charged on the reverse hereof,

OU ARE THEREFORE HEREBY MANDED to take the said

....

bring him/her before the said COURT GENERAL SESSIONS forthwith to the said charge.

Itness the Honorable JOHN LEWIS II, JR., Chief Judge of the District of mbia Court of General Sessions, and the of said Court this .... day of .... A.D. 1965

WALTER F. BRAMHALL
Clerk, Court of General Sessions

.... Deputy Clerk

THIS WARRANT ISSUE

....
Judge, Court of General Sessions
OFFICER MUST EXECUTE CEPI
Amount Collateral Posted $..........
Date Collateral Posted ....
Precinct Collateral Posted ....
Remarks ....
...'S NAME ....

BOND
Col. ....
At No. ...... Precinct

No. TR 6103-'65
Date ....

BOOK .... TAG ....
TICKET 226321 AUTO ....
TD Precinct

INFORMATION
TRAFFIC
DISTRICT OF COLUMBIA
(12)

vs.
James F. Swails

Address ....
Age 41 Color C
Permit .... Tag ....

VIOLATION OF TRAFFIC REGULATIONS

FAIL TO REPORT ACCIDENT TO POLICE

SPEED

RECKLESS DRIVING

DRIVING WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR

PROPERTY DAMAGE ONLY

LEAVING AFTER COLLIDING

WITNESSES TD.

W. L. Cumberland Officer

APR 12 1965

Cont 4/21/65
Not Reached

FILED for hg. & sent.
APR 8 9 30 AM '65
CLERK OF
DISTRICT OF COLUMBIA
COURT OF GENERAL SESSION

APR 21 1965

Cont 5/7/65
Not reached

MAY 7 1965

Cert to J. Kronheim

PLEA NOT GUILTY
Cont 5/10/65

5/10/65
Trial resumed
JUDGMENT GUILTY
C 6/14/65

60 days
Appeal Bond set
at 500 $
TR 6102 '65

JUN 14 1965
M. N. Robinson, Surety

16

District of Columbia Court of General Sessions

CRIMINAL DIVISION JANUARY TERM, A.D. 1965

THE DISTRICT OF COLUMBIA, ss:

CHESTER H. GRAY, Esq., *Corporation Counsel, by* { CLARK F. KING / ROBERT H. CAMPBELL / ..... }

Assistant Corporation Counsel, who for the District of Columbia prosecutes in this behalf in his proper person, comes here into Court, and causes the Court to be informed, and complains that

Jesse F. Sowell

late of the District of Columbia, aforesaid, on or about the 6 day of MARCH in the year A.D. nineteen hundred and sixty-five, in the District of Columbia, aforesaid, and on 3100 - 3400 Pa. Ave. Street, Avenue, north, south, west, ~~east~~, ~~and on divers other streets~~ did then and there operate a certain vehicle at a greater rate of speed than ~~fifteen twenty-five thirty thirty-five forty forty-five fifty miles an hour~~ is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing

~~when passing a school building grounds during recess periods playgrounds when such playgrounds are in use and the same~~

~~indicated by an official sign and the speed limit designated thereon, said street designated as an arterial highway by the Director of Motor Vehicles.~~

~~carelessly and heedlessly in willful and wanton disregard for the rights and safety of others and without due caution and circumspection and at a speed and in a manner so as to endanger any person and property and to be likely to endanger any person and property~~

~~while under the influence of intoxicating liquor narcotic drug~~

~~and did injure a certain person therewith~~

~~and having done substantial damage to property therewith~~

~~did fail to stop and give assistance, together with his name, place of residence, including street and number, and the name and address of the owner of the vehicle so operated.~~

~~to the person so injured to the owner of such property so damaged or to the operator of such motor vehicle~~

~~or to a bystander who has requested such information on behalf of the injured person~~

~~and did fail to report said accident to a police station or to a police officer immediately, the owner or operator of such other vehicle not being present~~

~~The aforesaid ..... having heretofore to wit: On the ..... day of ..... in the year 19 been convicted in the Municipal Court for the District of Columbia of a violation of the Reckless Driving Fleeing from the scene of an accident law of said District, said judgment still remains in full force and effect, not having been set aside or reversed.~~

~~The aforesaid ..... having heretofore to wit: On the ..... day of ..... in the year 19 been convicted in the Municipal Court for the District of Columbia of a violation of a ..... offense of the Reckless Driving. Driving While Under the Influence of Intoxicating Liquors Law of said District said judgment still remains in full force and effect not having been set aside or reversed.~~

~~other than one on official business and did follow a fire apparatus traveling in response to a fire alarm closer than 500 feet and did drive into and did park such vehicle within the block where fire apparatus had stopped in answer to a fire alarm.~~

Contrary to and in violation of ..... an Act of Congress, Secretary of the Interior, the Traffic Regulation in such case made and provided, and constituting a law of the District of Columbia.

CHESTER H. GRAY,
Corporation Counsel

Personally appeared W. L. Curtis this 8 day of ....., A. D., 1965, and made oath before me that the facts set forth in the foregoing information are true, and those stated upon information received he believes to be true.

.....
Assistant Corporation Counsel in and for the District of Columbia

TR 6103-65

JUDGMENT

June 15, 1965

Judge Kronheim

Plea Not Guilty,

Judgment Guilty.

60 days.

Appeal Bond set at $500.00

18

WARRANT

No. ....

STRICT OF COLUMBIA, ss:

the Chief of Police of the
istrict of Columbia, Greetings:

Whereas, it appears by oath of

....

t ....

mmitted the offense as charged on the reverse
: hereof,

YOU ARE THEREFORE HEREBY
MMANDED to take the said

....

I bring him/her before the said COURT
GENERAL SESSIONS forthwith to
wer said charge.

Witness the Honorable JOHN LEWIS
ITH, JR., Chief Judge of the District of
umbia Court of General Sessions, and the
l of said Court this .... day of
.... A.D. 1965

WALTER F. BRAMHALL
Clerk, Court of General Sessions

....
Deputy Clerk

T THIS WARRANT ISSUE

....
Judge, Court of General Sessions
OFFICER MUST EXECUTE CEPI

Amount Collateral Posted $..........
Date Collateral Posted ....
Precinct Collateral Posted ....
Remarks ....

ICER'S NAME ....

BOND

Col. .... No. TR 6100-'65

At No. ...... Precinct Date ....

INFORMATION (12)
TRAFFIC
DISTRICT OF COLUMBIA

vs.

James F. Swailes

Address ....

Age 46 Color c

Permit .... Tag ....

VIOLATION OF TRAFFIC REGULATIONS

FAIL TO REPORT ACCIDENT TO POLICE

SPEED RECKLESS DRIVING

DRIVING WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR

PROPERTY DAMAGE ONLY

LEAVING AFTER COLLIDING

Atty [illegible] T.D.

WITNESSES

W. L. [illegible]

Officer

Rec No. ....

Jury Trial ....

Cond ....

Bond ....

See Inside

BOOK .... TAG 266330

TICKET .... AUTO

T.D. Precinct

APR 12 1965

Cont 4/27/65
Not Reached

FILED
MAR 8 9 30 AM '65
CLERK, DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS

APR 21 1965

Cont 5/7/65
Not Reached
(3)

MAY 7 1965

Certified to Judge Kronheim

5/7/65
(Miss Paniszko)
TRIAL BY JURY
Respited to 5/10/
at 11 A.M.

See 6101-2-3 '65

5/10/65
Trial resumed
VERDICT NOT GUILTY
DEFT. DISCHARGED

See TR 6101-2-3 '65

District of Columbia Court of General Sessions

19

CRIMINAL DIVISION JANUARY,

THE DISTRICT OF COLUMBIA, ss: _____ TERM, A.D. 1965

CHESTER H. GRAY, Esq., *Corporation Counsel, by* { CLARK F. KING / ROBERT H. CAMPBELL / _____ }

Assistant Corporation Counsel, who for the District of Columbia prosecutes in this behalf in his proper person, comes here into Court, and causes the Court to be informed, and complains that

James F. Swailes

late of the District of Columbia, aforesaid. on or about the 6 day of MARCH in the year A.D. nineteen hundred and sixty-five, in the District of Columbia, aforesaid, and on Sherman Street, Avenue, north, ~~south~~, west, ~~east~~, and on divers other streets

did then and there operate a certain vehicle ~~at a greater rate of speed than fifteen~~ twenty-five thirty thirty-five forty forty-five fifty miles an hour.
is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing
when passing a school building grounds during recess periods playgrounds when such playgrounds are in use and the same
indicated by an official sign and the speed limit designated thereon, said street designated as an arterial highway by the Director of Motor Vehicles.
carelessly and heedlessly in willful and wanton disregard for the rights and safety of others and without due caution and circumspection and at a speed and in a manner so as to endanger any person and property and to be likely to endanger any person and property
while under the influence of intoxicating liquor ~~narcotic drug~~
and did injure a certain person therewith
and having done substantial damage to property therewith
did fail to stop and give assistance, together with his name, place of residence, including street and number, and the name and address of the owner of the vehicle so operated.
to the person so injured to the owner of such property
so damaged or to the operator of such motor vehicle
or to a bystander who has requested such information on behalf of the injured person
and did fail to report said accident to a police station or to a police officer immediately, the owner or operator of such other vehicle not being present

The aforesaid _____ having heretofore to wit: On the _____ day of _____ in the year 19 been convicted in the Municipal Court for the District of Columbia of a violation of the Reckless Driving
Fleeing from the scene of an accident law of said District, said judgment still remains in full force and effect, not having been set aside or reversed.

The aforesaid _____ having heretofore to wit: On the _____ day of _____ in the year 19 been convicted in the Municipal Court for the District of Columbia of a violation of a _____ offense of the Reckless Driving.
Driving While Under the Influence of Intoxicating Liquors
Law of said District said judgment still remains in full force and effect not having been set aside or reversed.

other than one on official business
and did follow a fire apparatus traveling in response to a fire alarm closer than 500 feet and did drive into and did park such vehicle within the block where fire apparatus had stopped in answer to a fire alarm.

Contrary to and in violation of _____ an Act of Congress, Secretary of the Interior, the Traffic Regulation in such case made and provided, and constituting a law of the District of Columbia.

CHESTER H. GRAY,
Corporation Counsel

Personally appeared W. L. Cupples this 8 day of [illegible], A. D., 1965, and made oath before me that the facts set forth in the foregoing information are true, and those stated upon information received he believes to be true.

_____
Assistant Corporation Counsel in and for the District of Columbia

DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS

Criminal Division

Probation Department

PRE-SENTENCE INVESTIGATION

DATE OF ARREST: 3-8-65
DATE REC'D. PROB. OFFICE: 5-10-65
DATE CONTINUED: 6-14-65

BOND: $100
ATTY: O'Malley
OFFR: W.L. Cypher, T.D., A.I.U.

SENTENCE: 6-14-65

TO: Honorable Milton S. Kronheim, Judge

FROM: Richard J. Dunn, Probation Officer

SUBJECT: James Franklin Swailes

CHARGE: Speed
Change Lanes

CASE NO.: TR 6102,03-'65

COURT ACTION: 3-8-65, Continued to 4-12-65, 4-12-65, Plea Not Guilty, Jury Trial Demanded, Continued to 5-7-65, Certified to Kronheim, Continued to 5-10-65; 5-10-65, Plea of Not Guilty Withdrawn, Plea of Guilty Entered, Judgment Guilty, Continued to 6-14-65 for Report and Sentence.

STATEMENT OF FACTS: (Submitted by Pvt. W.L. Cypher, A.I.U., dated 3-6-65)

"About 6:45 P.M., Saturday, March 6, 1965, the above named defendant was observed operating a 1963 Chrysler, 4 door bearing old D.C. Tags, 4E 615, north on Sherman Ave., N.W. at a high rate of speed. He was weaving from one side of the roadway to the other, coming very close to colliding with about three traffic islands, and also came close to colliding with our traffic car. The defendant was asked to get out of the car. When doing so, he was unsteady on his feet and had a strong odor of alcohol on his breath. The defendant was then transported to the 10th. Precinct and was charged with Unreasonable Speed, Changing Lanes Without Caution, Reckless Driving, Driving While Drunk. The defendant was asked if he wanted to give urine specimen and he said yes. While in the men's room, he tried to put fresh water into the bottle instead of his urine. So after that, he would not give any specimen."

DEFENDANT'S STATEMENT TO P.O.:

"I had just eaten some crackers and sharp cheese. I also had three short beers."

RECORD:

M.P.D.C. Criminal Records Div. -

5-7-50	Disorderly	No disposition
12-7-58	Disorderly	EF $5.00

F.B.I Abstract #4055606

6-12-43	Larceny	Dismissed
9-28-47	Grand Larceny	Investigation and Released
5-10-65	Speed & Changing Lanes	

Dept. of Motor Vehicles, Glen Burnie, Md.

12-22-63	Reckless driving (acc)	$25 and costs
12-22-63	Operating Without a License (acc)	$25 and costs
12-22-63	Speeding (acc)	$25 and costs
3-20-64	Financial Responsibility Case, Suspended Acc. 12-22-63	

M.P.D.C. Traffic Records -

3-4-55	Operating door on traffic side (accident)	WF $12
6-12-55	Violate One-Way Street	WF $7
1-5-56	Permit Susp. 15 days on 9 points.	
1-30-56	Permit Restored	
5-15-57	Unreasonable Speed	EF $10
8-22-57	Served 30 Day Susp.	
7-28-57	Speed	EF $10
10-23-57	Revoked	
10-26-57	Traffic School 90% D.I.S.	
12-5-57	Hearing - One Year Probation	
1-18-58	Fail keep right	EF $5
3-4-58	Served 30 day suspension	
3-10-58	Surrendered Permit 30 days	
4-10-58	Restored	
11-21-58	Improper Right turn	Not Guilty
2-6-60	Unreasonable speed	EF $10
3-4-60	Served on 45 day susp.	
3-28-60	Director appealed	
4-22-60	Served & Surrendered Permit	
8-5-61	Unreasonable Speed	EF $10
4-13-63	Speed 40/25	EF $15
3-6-65	Driving While Drunk	Not Guilty
	Unreasonable Speed	
	Reckless Driving	Not Guilty

PERSONAL HISTORY AS GIVEN BY DEFENDANT

AGE: 41 years. DATE AND PLACE OF BIRTH: 3-11-23, Maryland.

RACE & SEX: N/M.

PHYSICAL DESCRIPTION: Height:5'11". Weight: 275 lbs. Eyes: Brown. Hair: Black. Complexion: Medium Brown. Physical Condition: Good. Scars or Marks: None.

HABITS: Subject's feelings are that he does not have a drinking problem.

TIME IN D.C.:

ADDRESSES: Present: 5243 Chillum Place, N.E. (private home) - for the past six years (LA 6-4386).

RELATIVES: Father: James F. Swailes, age 60 years. - Leonard Town, Md. Is a farmer.

Mother: Mary Letha nee: Brooks - deceased.

Brothers: None.

Sisters: Yevenna, age 37, 1427 Shaffer St., N.W.
Eleanor Swailes, age 35
Helen Swailes, age 44

MARITAL STATUS: Married on 10-5-47 in Hyattsville, Md.

CHILDREN: James, III, age 17
Cynthia, age 14,
Kenneth, age 11
All children live at home with parents and are students.

RELIGION: Roman Catholic. CHURCH ATTENDED: St. Anthony's. FREQUENCY OF ATTENDANCE: Weekly.

EDUCATION: Banniker High School, Loverville, Md. 1937 to 1938.

SOCIAL SECURITY NUMBER: 219-12-2773.

EMPLOYMENT: Present: Charles H. Tompkins, World Bonds Const., 19th and F Streets, N.W. - for one year as a laborer.

Prior: Kirk Lindsay, 1700 & "L" Streets, N.W. as a shop steward - one year.

RESOURCES: House mortgage - Jefferson First Federal.

CLUBS, LODGES AND UNIONS: Local #74.

DRAFT STATUS: Veteran. SERIAL NO.: RA 33-731694.

ADDITIONAL INFORMATION:

Although the use of alcohol was involved in this offense, it is the opinion of this officer that this was a rather isolated experience and there are no strong indications that alcohol is a problem in this man's life.

SUMMARY AND EVALUATION:

Mr. James Swails is a neat appearing rather ingratiating Negro male who is the product of a rural southern environment.

According to Mr. Swailes, his childhood was a normal one and there was no indication of any traumatic effects from his early childhood. His father was a farmer in Lonordtown, Md., and subject was the second of four children and according to him, he completed his second year of high school, but the records of the school he indicates he attended show no evidence of his having been enrolled there.

In 1943 subject enlisted in the U.S. Army and apparently served honorably until his discharge in March of 1946.

The following year, he met and married Hellen Brooks and at this writing, it appears that this has been a most successful marriage. There are three children from this union, ranging in ages from eleven to 17 years. All of the children are in school and living at home with the parents.

6-11-65. This defendant was brought in today for personal interview. As a result of interview and review of the entire situation, this man having been under the influence of liquor when this offense took place (however, he was found not guilty of Driving While Drunk), it would appear that this man has forfeited all right to further consideration with respect to probation in this case.

It further appears that he has reached the point where he must realize the hard way that his rights stop precisely where others' begin. He is a menace on the highway.

Probation is not recommended. (RJC)

Respectfully submitted,

Richard J. Dunn
Probation Officer

APPROVED: /s/
Director of Probation

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 20,168

JAMES F. SWAILES,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal From The District Of Columbia
Court of Appeals

CHARLES T. DUNCAN,
Corporation Counsel, D. C.

MILTON D. KORMAN,
Principal Assistant Corporation
Counsel, D. C.

HUBERT B. PAIR,
Assistant Corporation
Counsel, D. C.

DAVID P. SUTTON,
Assistant Corporation
Counsel, D. C.

Attorneys for Appellee,
District Building,
Washington, D. C. 20004

COUNTER-STATEMENT OF QUESTIONS PRESENTED

In the opinion of the appellee, the questions presented are:

1. Is it not speculation to assume that the sentences imposed upon appellant were improperly influenced by allegedly prejudicial statements contained in a pre-sentence report?

2. Did appellant's acquittal of reckless driving bar, under the doctrines of double jeopardy or res judicata, his convictions of operating a motor vehicle at an unreasonable speed and of changing lanes without caution?

3. Since appellant did not lay the requisite foundation for the introduction of impeachment evidence, was not the subpoena duces tecum, which he sought to obtain, properly denied?

4. Were not the judgments of conviction supported by substantial evidence?

5. Since the statute provides for a sentence of either a fine of $300 "or" 90 days imprisonment, was the court precluded from the imposition of a straight time sentence?

I N D E X

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SUBJECT INDEX

CASES CITED

DISTRICT OF COLUMBIA CODE, 1961, CITED

ACT OF CONGRESS CITED

OTHER AUTHORITIES CITED

UNITED STATES COURT OF APPEALS
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JAMES F. SWAILES,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal From The District Of Columbia
Court Of Appeals

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

Appellant was tried by a jury in the Court of General Sessions on charges of operating a motor vehicle while under the influence of intoxicating liquor and reckless driving. Concurrently, he was tried by the court on charges of operating a motor vehicle at an unreasonable speed and of changing lanes without caution. (J. A. 12, 15, 18.)

The substance of the evidence adduced at trial, which commenced on Friday, May 7, 1965, was that, on March 6, 1965, a motor vehicle operated by appellant in a northerly direction on Sherman Avenue, N. W., was observed by two police officers who were responding, in a police vehicle, to an accident call. Appellant's automobile was proceeding at a high rate of speed and was weaving in traffic. It "crossed over a white island * * * onto the other side of the street, almost came in collision with the safety island; [and] then * * * pulled back over * * * in front of another car." Upon observing such conduct, the officers, in an attempt to stop appellant's vehicle, switched on their red light, sounded the siren, and proceeded after it. (J. A. 1-3, 6, 7.) The officers pursued the vehicle for approximately three blocks while it continued to move from one lane to the next and "just about missed three safety islands." At one point, appellant pulled out in front of the police vehicle as its siren was kept sounding. (J. A. 2, 4, 7.) In their attempt to overtake appellant, the officers were compelled to accelerate to speeds as high as 50 miles per hour (J. A. 3, 8) in an area where the speed limit is 25 miles per hour (J. A. 3, 8). Both officers estimated appellant's speed at 40 miles per hour (J. A. 3, 5, 7).

On cross-examination, one of the officers stated that, because it was dark at the scene of the arrest, he did not observe appellant's eyes until the officers and appellant arrived at the precinct station-house, and that their bloodshot condition (which he had noted on the "police form") was not one of the things which led him to conclude that appellant was intoxicated at the time of his arrest (J. A. 5, 6). The officer was then asked whether he had "ever" told defense counsel that the bloodshot condition of appellant's eyes was one of the things he considered in determining that appellant was intoxicated. The officer replied that he did not believe he had ever made such a statement. (J. A. 6.) The matter was not further pursued at that time.

Testifying in his own behalf, appellant stated that he did not change lanes without caution (J. A. 9). He offered no evidence as to his speed, but stated that he "would say" that, while on Sherman Avenue, he had been "driving in a careful manner" (J. A. 10).

At the conclusion of the defense testimony (on the following Monday, May 10, 1965), defense counsel stated to the court that it was his recollection that, at a hearing before the Department of Motor Vehicles, the officer had testified that the bloodshot condition of appellant's eyes was one of the things which led him to conclude

that appellant was intoxicated at the time of his arrest. Asserting that they were needed for the purpose of impeachment, appellant moved the court to issue a subpoena duces tecum for the production of pertinent records of the Department of Motor Vehicles. The motion was denied. (J. A. 10, 11.)

The jury found appellant not guilty of the charges of operating a motor vehicle while under the influence of intoxicating liquor and of reckless driving (J. A. 18), and the court then found appellant guilty of the charges of unreasonable speed and of changing lanes without caution (J. A. 12, 15).

After considering a pre-sentence report (J. A. 20-24), the court imposed concurrent sentences of 60 days in jail on the unreasonable speed charge and $10 or two days in jail on the charge of changing lanes without caution (J. A. 14, 17). The District of Columbia Court of Appeals affirmed, and this Court thereafter granted appellant's petition for the allowance of an appeal.

SUMMARY OF ARGUMENT

I

Because the record does not indicate that, in sentencing appellant, the trial court gave any consideration whatsoever to inci-

dental statements in the pre-sentence report relating to appellant's failure to take a sobriety test and to the probation officer's opinion as to appellant's sobriety, it is sheer speculation to assume that the sentences imposed were based upon improper considerations.

II

Because the trier of the facts could have concluded, as he did, that appellant operated a motor vehicle at an unreasonable speed and changed lanes without caution, even though the jury decided that his operation of such motor vehicle did not constitute reckless driving, appellant's acquittal of the latter offense did not, under either the doctrine of double jeopardy or of res judicata, bar his convictions on the other two offenses.

III

Because appellant did not, with particularity as to time, place, and circumstances, specifically direct to the attention of the Government witness the alleged prior inconsistent statement, he was not entitled, for purposes of impeachment, to compel production of records alleged to contain such a statement.

IV

Because two Government witnesses testified to facts establishing that appellant operated a motor vehicle at an unreasonable speed and changed lanes without caution, and because the only differences in their testimony were insubstantial and immaterial, it cannot be said as a matter of law that appellant's convictions lacked evidentiary support.

V

By the plain provisions of § 40-605(d), D. C. Code, 1961, Congress intended that a defendant convicted of speeding should, in the discretion of the sentencing judge, and not at the option of the defendant, be fined or imprisoned. This conclusion is fortified by comparison of § 40-605(d) with another section of the District of Columbia Traffic Act of 1925 authorizing in certain instances the imprisonment of a defendant only upon "default" of the payment of a fine.

ARGUMENT

I

Alleged bias and prejudice on the part of the sentencing judge did not motivate the concurrent sentences imposed upon appellant.

Attacking the sentences imposed as having been motivated by bias and prejudice, appellant contends that the sentencing judge was improperly influenced by matters set forth in a pre-sentence report. The comprehensive pre-sentence report prepared by the probation officer indicated, among many other things, that appellant had refused to submit to a sobriety test and that, "as a result of interview and review of the entire situation," in the probation officer's opinion, appellant, although acquitted by the jury of driving under the influence of intoxicating liquor, was, in fact, "under the influence of liquor when this offense took place." However, the report also set forth appellant's extensive traffic record, which discloses that, since 1955, appellant has consistently driven in a manner violative of traffic regulations, and that the suspension of his operator's permit on more than one occasion has not served to deter him from such unlawful and unsafe driving (J. A. 21). To say that the sentences imposed were based on a belief by the sentencing judge that appellant

was under the influence of intoxicating liquor[1] at the time of the speeding offense or was influenced by appellant's refusal to take a sobriety test, rather than upon consideration of his patently flagrant traffic record, is to indulge in sheer conjecture and surmise. Unless we are to disregard the established proposition that "error is not to be presumed, but must be made affirmatively to appear by the party asserting it," such speculation cannot form a legitimate basis for a conclusion that the court was improperly influenced by the presentence report. See Morris v. District of Columbia, 75 U. S. App. D. C. 82, 124 F. 2d 284 (1941); Berenter v. Staggers, ____ U. S. App. D. C. ____, 362 F. 2d 971 (1966). See also Driver v. State, 201 Md. 25, 92 A. 2d 570 (1952), where it was unsuccessfully contended that the sentencing judge was influenced by improper considerations set forth in the report of a probation officer, and where the Court of Appeals was unwilling to assume that the trial judge made improper use of such report. And see the more recent case of Costello v. State, 237 Md. 464, 206 A. 2d 812, 816 (1965),

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[1] Obviously, since the court presided over appellant's trial on the charge of driving while under the influence of intoxicating liquor, if he did entertain such a belief, the probation report could not have prompted him to do so.

where it was held that there is a "presumption" that a sentencing judge "made proper use of a [pre-sentence] report."

A trial judge is clothed with wide discretion in his consideration of the sources and types of information utilized to assist him in determining the sentence imposed. Williams v. New York, 337 U. S. 241 (1949). He is by no means limited to a consideration of previous convictions entered against the defendant, but may attach significance to instances of misconduct which have not been stamped with the imprint of a criminal conviction. Williams v. New York, supra; Jones v. United States, 113 U. S. App. D. C. 233, 235, 307 F. 2d 190, 192 (1962).

Consonant with the above principles, appellate tribunals have countenanced the consideration by trial judges of "criminal charges which had not predicated convictions," Jones v. United States, supra; Young v. United States, 259 F. 2d 641 (8th Cir., 1958); offenses of which the defendant has been acquitted, State v. Woodlief, 172 N. C. 885, 90 S. E. 137 (1916); People v. Griffin, 60 Cal. 2d 182, 32 Cal. Rptr. 24, 383 P. 2d 432 (1963), reversed on other grounds, sub nom, Griffin v. California, 380 U. S. 609 (1965); and information relating to complaints of other offenses alleged to have been committed by the defendant. Waddell v. State, 24 Wis. 2d 364, 129 N. W. 2d 201 (1964).

In State v. Woodlief, supra, a defendant was charged with assault with a deadly weapon and with carrying a concealed weapon. The jury acquitted him of the assault charge notwithstanding substantial evidence of guilt, and he pled guilty to the additional charge. The trial judge, disapproving of defendant's acquittal by the jury and believing that the defendant had, in fact, assaulted another with a deadly weapon, took this circumstance into consideration in imposing sentence on the charge of carrying a concealed weapon. On appeal, it was contended, as in the instant case, that the sentence imposed was based upon improper considerations. Rejecting this contention and concluding that the defendant's apparent guilt of the charge of which he was acquitted could be considered by the trial judge in imposing sentence, the Court said (90 S. E. 139, 140):

> "* * * While the jury acquitted defendant of the other charge, because, as they explained to the judge, the evidence had not satisfied them of the defendant's guilt, the verdict did not estop the judge, or deprive him of the right, to form his own opinion of the defendant's guilt, and to consider it as a circumstance in estimating the degree of punishment he should impose for carrying the concealed weapon. * * *
>
> * * * * *

> "* * * While he was acquitted, the evidence against him, in the case for assault, seems to have been very strong, and was sufficiently so to justify, of itself, the sentence of the court, if it needed any such justification. He cannot be punished for one offense merely because he has committed another, but his general conduct may be considered in gauging punishment."

Similarly, if, arguendo, the trial court believed that appellant operated a motor vehicle while under the influence of intoxicating liquor, the court, in sentencing him on the charges of unreasonable speed and changing lanes without caution, did not err in considering this circumstance notwithstanding his acquittal of such a charge. Accordingly, on no theory can it be maintained that the sentence imposed upon appellant was motivated by bias and prejudice on the part of the trial judge.

II

The finding of not guilty of the offense of reckless driving did not preclude findings of guilty of the offenses of operating a motor vehicle at an unreasonable speed and of changing lanes without caution.

Appellant's convictions of operating a motor vehicle at an unreasonable speed and of changing lanes without caution, following

his acquittal of reckless driving, were not, as asserted, convictions of lesser, included offenses and were, therefore, not barred by considerations of double jeopardy or res judicata.

In Crosby v. United States, 119 U. S. App. D. C. 244, 245, 339 F. 2d 743, 744 (1964), this Court clearly set forth the test as to what constitutes a lesser, included offense as follows:

> "Rule 31(c) of the Federal Rules of Criminal Procedure provides that '[t]he defendant may be found guilty of an offense necessarily included in the offense charged * * *.' (Emphasis added.) Other Circuits have construed this Rule to mean that a chargeable lesser offense must be such that the greater offense cannot be committed without also committing the lesser. * * *" [Citations omitted; emphasis added.]

And in Davenport v. District of Columbia, 61 A. 2d 486, 490 (1948), the Municipal Court of Appeals, relying upon decisions of this Court, succinctly stated the test of double jeopardy as follows:

> "* * * The case in which a defendant may successfully plead former jeopardy must be identical in law and in fact with a former case in which he was put in jeopardy. This rule is variously stated as: that the first indictment sufficiently described the second offense so that defendant could have been convicted of the second upon the trial of the first; or that the evidence required to prove the two offenses was the same. However,

> this rule is not interpreted to mean that only one offense and charge can arise from a single set of facts. The law is replete with instances wherein two or more offenses against the statutes or common law of the same sovereign may result from a single factual transaction." [Footnotes omitted; emphasis added.]

The above principles are no less applicable in traffic cases. In State v. Thatcher, 108 Utah 63, 157 P. 2d 258 (1945), the defendant was charged and convicted of speeding and was thereafter charged with involuntary manslaughter arising out of the same incident. The trial court held that, because "defendant had been once punished for the act of speeding," such act could not be considered a second time as an element of the charge of involuntary manslaughter. On appeal, however, the Court of Appeals, expressing a different viewpoint, said (157 P. 2d 262):

> "* * * A prosecution is for the entire offense and not for the separate elements thereof. If a prosecution is barred, it bars the entire action and not merely the use of certain elements thereof. So our question is, whether as a whole the acts charged in the two actions are the same. If they are, then the second prosecution is barred. If they are not, then the action is not barred even though some of the acts proved in the first prosecution are also elements of the second. * * *
>
> * * * * *

> " * * * Here the act charged is running into and causing the death of the deceased; in the former action the act charged was speeding. While the running into the deceased may have been caused by the speeding charged in the first prosecution, still taken as a whole the act charged in the two actions are distinctly different, and therefore the conviction and sentence in the first does not bar the second prosecution." [Emphasis added.]

And in the more recent case of State v. Hietter, 203 A. 2d 69 (Del. Sup. Ct., 1964), where a person was charged with driving under the influence of intoxicating liquor and reckless driving, the evidence offered by the State " * * * endeavored to show that the defendant's driving was erratic as the result of his alleged consumption of alcoholic beverages and that the defendant was driving at such a rate of speed as to constitute reckless conduct." There, as here, the defendant was acquitted of both charges. He was subsequently charged in a six count indictment with "manslaughter." Three of the counts charged the defendant with "reckless conduct in the operation of his motor vehicle," one count charged him with "drunken driving," and the remaining two counts charged him with driving at an excessive and unsafe speed. While the Court held, on appeal, that the counts relating to reckless driving and driving while under the influence of liquor were defective by virtue of the

previous judgments of acquittal, it held also that the counts relating to the acts of speeding were, by no means, similarly defective. The Court said (203 A. 2d 74):

> " * * * The two counts in question, as noted above, charged the defendant with driving at an excessive and unsafe speed. Such actions do not require a finding of reckless conduct. Therefore, the defendant has never been placed in jeopardy for the offenses charged in these two counts and the quantum of evidence required to support the original charges is substantially greater than the quantum of evidence required to support the charges indicated in the indictment. * * * "
> [Emphasis added.]

Cf. Busbee v. State, 183 So. 2d 27 (Fla. App., 1966).

When the foregoing rules are applied in the instant case, it becomes obvious that appellant was not improperly convicted of a lesser, included offense and was not, therefore, subjected to "double jeopardy." The offenses of reckless driving, operating at an unreasonable speed, and changing lanes without caution[2] are clearly not

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[2] It should be noted that trial of the charges on which defendant was convicted did not occur subsequent to his acquittal of the offenses of operating while under the influence of intoxicating liquor and reckless driving. Rather, all four offenses were contemporaneously tried, and this case is, therefore, devoid of the circumstance, sometimes encountered, of a disappointed prosecutor who sought a "second bite at the apple."

the same either in law or in fact. Nor is the evidence required to prove these offenses the same. On the facts of the instant case, the court might well conclude that appellant operated his motor vehicle at an unreasonable speed and changed lanes without caution, but did not, at the same time, operate in a manner so wanton and dangerous as to constitute reckless driving. Indeed, the more flagrant nature of the latter offense, as compared to an offense such as that of speeding, now in question, was clearly pointed out by the Supreme Court. See District of Columbia v. Colts, 282 U. S. 63, 50 S. Ct. 461, 75 L. Ed. 177 (1930); and see Wharton's Criminal Law and Procedure, § § 1000-1001 (1957).

III

The trial court's denial of appellant's request for the issuance of a subpoena duces tecum was not an abuse of discretion.

In an attempt to establish, on the part of a Government witness, an alleged prior inconsistent statement to the effect that the bloodshot condition of appellant's eyes was a factor which influenced his determination that appellant was, at the time of his arrest, under the influence of intoxicating liquor, counsel for appellant, at the conclusion of all the testimony, requested the trial judge to issue a sub-

poena duces tecum for the production of certain records of the Department of Motor Vehicles. The request was predicated upon the following cross-examination of the witness:

> Q. I'm asking you if the bloodshot eyes had any effect upon your determination that Mr. Swailes was under the influence of alcohol.
>
> A. No, sir.
>
> * * * * * *
>
> Q. Did you ever make any observation to me that Mr. Swailes had a bloodshot eye and that was one of the things you considered?
>
> A. No, sir. I do not believe I ever made that statement to you. (J. A. 6.)

Appellee submits that the cross-examination by counsel for appellant fell far short of laying the requisite foundation for the introduction of the proposed impeachment evidence. The trial judge, therefore, properly refused to issue a subpoena duces tecum for the records in question. In Gordon et al. v. United States, 53 App. D. C. 154, 289 Fed. 552 (1923), this Court enunciated the applicable rule of law as follows (53 App. D. C. 156):

> "* * * It is a well-settled principle that a witness cannot be discredited * * * by proving statements made by him outside of court which do not harmonize with the statements made by him on the witness stand, until his attention has been called specifically to the former statements, with particularity as to time, place, and circumstance, so that he can deny or explain them. * * * " [Emphasis added.]

Here, as in Gordon, because the questions of counsel lacked the requisite "particularity as to time, place, and circumstance," appellant failed to lay the required foundation for the introduction of the proposed impeachment evidence. Accordingly, the trial judge acted well within the bounds of his discretion in refusing to issue the requested subpoena.

Further, whether the "bloodshot" condition of appellant's eyes was a factor which influenced the officer's belief that appellant was operating under the influence of intoxicating liquor (a charge of which he was admittedly acquitted and, therefore, not before this Court) is quite collateral to the charges that he operated a motor vehicle at an unreasonable speed and changed lanes without caution. The court's failure to issue the requested subpoena was, therefore, by no means prejudicial. Cf. Morris v. District of Columbia, 75 U. S. App. D. C. 82, 124 F. 2d 284 (1941).

IV

The judgments of conviction are supported by substantial evidence.

There was ample evidence from which the trial court could have found, as it did, that appellant operated a vehicle at an unreasonable rate of speed and that he changed lanes without caution. As to the speeding charge, the evidence was that appellant was pursued for a distance of approximately three blocks by a police vehicle, the operator of which was compelled to accelerate to speeds as high as 50 miles per hour in an attempt to overtake appellant's automobile (J. A. 2, 3, 8). In addition, notwithstanding the speed limit of 25 miles per hour, the overall estimate of appellant's speed by both police officers was 40 miles per hour (J. A. 3, 5, 7, 8). Significantly, appellant offered no evidence whatever as to the speed of his vehicle.

Regarding the charge of changing lanes without caution, the record discloses that appellant's vehicle was weaving in traffic; that it continued to move from one lane to the next while the police vehicle pursued it; that it cut in front of two automobiles, including the pursuing police vehicle; and that it almost collided with the police vehicle (J. A. 2, 4, 6, 7).

Appellant asserts, however, that the convictions cannot stand because the testimony of the two police officers was in certain respects inconsistent (brief, p. 11). The fact is, however, that the testimony of both officers was quite consistent as to the estimated speed of appellant's vehicle (J. A. 3, 5, 7, 8), as to the number of blocks appellant was pursued (J. A. 2, 6), and as to the cautionless movement of his vehicle from one lane to another (J. A. 2, 7). Indeed, as the District of Columbia Court of Appeals noted, the only differences in the officers' testimony "were insubstantial and immaterial" (219 A. 2d 102), a statement which can be fairly made with respect to the testimony of witnesses in almost any criminal case. In short, it cannot be seriously contended that, as a matter of law, appellant's guilt was not established beyond a reasonable doubt. See and compare 23 CJS Criminal Law, § 905b, p. 547 et seq.

V

The sentence imposed upon appellant was authorized by statute.

Appellant challenges the sentence of imprisonment imposed upon him pursuant to § 40-605(d), D. C. Code, 1961, which provides that a person convicted of speeding:

> " * * * shall * * * be fined not more than $300 or be imprisoned not more than ninety days. * * * "

It appears to be the position of appellant that a trial judge cannot, pursuant to the above-quoted provision, impose a jail sentence except in default of the payment of a fine, and that, since he was not first given the option of paying a fine, the sentence of 60 days imprisonment imposed upon him cannot stand (brief, p. 14). The most cursory glance at § 40-605(d), supra, reveals, however, that it will not admit of any such strained construction. It is a cardinal rule of statutory construction that a court must take a statute to mean what its language plainly imports and must enforce it according to its terms.[3] Chung Fook v. White, 264 U. S. 443 (1924); Cave v. District of Columbia, 67 App. D. C. 138, 90 F. 2d 383 (1937). This rule has been applied in cases involving statutory construction of penalty clauses similar in phraseology to § 40-605(b). Clawans v. District of Columbia, 66 App. D. C. 11, 84 F. 2d 265 (1936), aff'd. on other grounds, 300 U. S. 617 (1937); People v. Lamb, 67 Cal. App. 263, 227 Pac. 969 (1924); State v. Davis, 86

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[3] Appellant points to no pronouncement in the legislative history which tends to establish that a person convicted of speeding may at his option select a fine in lieu of a sentence of imprisonment.

S. C. 208, 68 S. E. 532 (1910); State v. Petty, 245 S. C. 40, 138 S. E. 2d 643 (1964); 24B CJS Criminal Law, § 1982C, p. 570.

Perhaps the most cogent reason which militates against the construction urged by appellant is found in the District of Columbia Traffic Act of 1925, itself, as amended and codified, § 16-706, D. C. Code, 1961, Supp. V, 1966. In addition to the provision in question, the same Act contains another provision which permits the Court of General Sessions to enforce any of its judgments rendered in criminal cases by committing a defendant for a term not to exceed one year but only "in default of the payment of the fine imposed." 43 Stat. 1120, ch. 443 (Emphasis added). A comparison of this provision with § 40-605(d), supra, will readily disclose an obvious difference in statutory language. In cannot be said that Congress, by its use of different expressions in the same statute, intended to make a distinction without a difference about the same subject matter of penalty. On the contrary, the inescapable conclusion must be that the jail sentence authorized by §40-605(d), supra, was intended as a primary alternative sentence, rather than as a secondary sentence like that authorized by § 16-706, D. C. Code, 1961, Supp. V, 1966, only upon the "default" of the payment of a fine. See Dorsey v. Peak, 58 App. D. C. 64, 24 F. 2d 892 (1928). Compare Bowles v. District of Columbia, 22 App. D. C. 321 (1903).

CONCLUSION

Upon the foregoing, it is respectfully submitted that the decision of the District of Columbia Court of Appeals affirming the judgments of conviction is in all respects correct and should be affirmed.

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